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**APPELLATE COURT**  
OF THE  
**State of Connecticut**

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JUDICIAL DISTRICT OF TOLLAND  
AT G.A. #19 (Rockville)

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**A.C. 42332**

**RICHARD A. HOUGHTALING**

**v.**

**COMMISSIONER OF CORRECTION**

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BRIEF OF THE COMMISSIONER OF CORRECTION-APPELLEE  
WITH ATTACHED APPENDIX

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**COUNTERSTATEMENT OF THE ISSUES**

- I. DID THE HABEAS COURT PROPERLY REJECT THE PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?
- II. DID THE HABEAS COURT ERR WHEN IT FAILED TO CONSIDER EXHIBIT 13 FOR ITS TRUTH?
- III. DID THE HABEAS COURT PROPERLY EXCLUDE A LETTER FROM THE IRS; ALTERNATIVELY, WAS ANY ERROR WAS HARMLESS?

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## **ABBREVIATIONS USED IN THIS BRIEF**

### **Abbreviation:**

### **Refers To:**

P/A

Petitioner's Appendix

P.Br.

Petitioner's Brief

R/A

Respondent's Appendix

P.Ex.

Petitioner's Exhibit(s)

R.Ex.

Respondent's Exhibit(s)

HT1

Habeas Trial Transcript of February 26, 2018

HT2

Habeas Trial Transcript of April 27, 2018

HT3

Habeas Trial Transcript of May 8, 2018

## NATURE OF THE PROCEEDINGS

In 2013, the petitioner, Richard Houghtaling, entered conditional pleas of nolo contendere to: (1) possession of marijuana with intent to sell, in violation of General Statutes § 21a-277 (b); and (2) possession of greater than four ounces of marijuana, in violation of General Statutes § 21a-279 (b). *State v. Houghtaling*, 155 Conn. App. 794 (2015). He did so after the trial court (*Riley, J.*) denied his motion to suppress evidence seized on property he owned in Canterbury, Connecticut. This Court affirmed the petitioner's convictions. *Id.* at 830. After granting certification to appeal, the Supreme Court affirmed this Court's decision. *State v. Houghtaling*, 326 Conn. 330 (2017), *cert. denied*, 138 S.Ct. 1593 (2018).

On October 24, 2017, the petitioner filed a petition for a writ of habeas corpus ("petition") alleging the ineffective assistance of his trial counsel. P/A at A5-A11. The habeas court (*Mullarkey, J.T.R.*) denied the petition on September 4, 2018; P/A at A18-A43; but granted certification to appeal. P/A at A47. This appeal followed. P/A at 845.

## COUNTERSTATEMENT OF THE FACTS

### **A. Trial Court Proceedings**

The habeas court adopted the following facts, recited by our Supreme Court:

On August 9, 2010, the Statewide Narcotics Task Force (task force) ... was conducting a marijuana eradication operation.... The operation was comprised of two spotters who were patrolling the area in a helicopter and a ground team consisting of several members.... [S]hortly after noon, the helicopter team notified the ground team of a suspected large crop of marijuana at 41 Raymond Schoolhouse Road in the town of Canterbury (property)..... The ground team arrived at the property approximately thirty minutes later.... The property consisted of 5.6 acres and was largely surrounded by dense forest. The only means of ingress and egress was a narrow dirt driveway more than 100 feet long and lined with trees ... and "No Trespassing" posted on trees....

*Houghtaling*, 326 Conn. at 333.

The ground team parked their cars in front of an open gate, set about halfway down the driveway, and walked to the front door of the house. *Houghtaling*, 326 Conn. at 333. After knocking and receiving no answer, the officers moved toward the back door, where they saw

"a pool area with dozens of marijuana plants...." *Id.* at 334. The officers then approached a greenhouse, still under construction, located behind the pool, near the rear of the property.

*Id.* The structure had no side walls, and inside it,

the police were able to see numerous marijuana plants and two men, one of whom was later identified as [Thomas] Phravixay. Both of the men were given ... warnings [under *Miranda v. Arizona*, 384 U.S. 486 (1966)] and agreed to answer questions. Phravixay told the officers he was renting the home and later gave the officers written consent to search the property. The search ultimately revealed more than 1000 marijuana plants.

*Houghtaling*, 326 Conn. at 334.

Two members of the ground crew returned to their cars and saw a white van pull into the driveway of the property, then reverse back into the street and depart "[v]ery quickly."

*Houghtaling*, 326 Conn. at 335. *Id.* Believing that the occupants of the van might be involved in the marijuana grow operation, the officers pursued the van and found it parked at the side of the road, with the petitioner in the driver's seat and his brother-in-law, William Eichen, in the passenger seat. *Id.* The officers approached the van and questioned the petitioner.

As the trial court found, [his] answers to the officers' questions were evasive.... While the police were questioning the [petitioner], they were able to observe from outside the van that it contained lumber and irrigation piping similar to that .... used to construct the greenhouse. The officers then handcuffed the [the petitioner and Eichen] and brought them back to the property....

[A]t the property, the police advised the defendant of his *Miranda* rights. The [petitioner] at first refused to speak with the police.... He [later] told the officers he had purchased the home in the prior year but could not afford the mortgage payments, so, to help cover his expenses, he leased the property to Phravixay.... The [petitioner] said Phravixay had paid rent only periodically, and the [petitioner] had been helping Phravixay cultivate marijuana for the previous four or five months to "recoup some of [his] money." Although the [petitioner] said he was helping with the cultivation, he stated that, "up until [that day, he] didn't realize the extent of the grow operation. I own my own business and didn't really think much of what was going on at the house ...."

*Houghtaling*, 326 Conn. at 335-36. The officers also obtained a consent to search from the petitioner. *Houghtaling*, 155 Conn. App. 794, 803 n.9.

The state originally charged the petitioner with numerous drug-related offenses. In

July 2012, he moved to suppress the evidence that the task force had seized and contested the legality of the automobile stop, his arrest, his and Phravixay's consent to search, and his police statement. *Id.* at 332, 366. The trial court held a hearing on January 31, 2013, at which both sides presented evidence but the petitioner did not testify. See *Houghtaling*, 326 Conn. at 336; *Houghtaling*, 155 Conn. App. at 799–800. In March 2013, the court denied the motion to suppress after determining that the petitioner had not established a subjective expectation of privacy in the property that society would deem reasonable and, thus, lacked standing to challenge the search. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (*Harlan, J., concurring*).<sup>1</sup> The petitioner then pled *nolo contendere*. *Houghtaling*, 326 Conn. at 337.

### **B. Appellate And Supreme Court Proceedings**

The petitioner appealed his convictions to this Court, which affirmed the denial of the motion to suppress, finding that the petitioner had not established a subjective expectation of privacy in the Canterbury property. *Houghtaling*, 155 Conn. App. at 802-08. After granting certification to review our Supreme Court later upheld this Court's decision, agreeing that the defendant lacked "standing to challenge the warrantless search of the property because he lacked a subjective expectation of privacy therein." *Houghtaling*, 326 Conn. at 340. The Supreme Court concluded that, at the suppression hearing, the petitioner failed "to adduce sufficient evidence to establish his intent to keep the property private and free from knowing exposure to the view of others." *Id.* at 348. It determined that, although the petitioner owned the property, he told the officers that he had leased the house to Phravixay, and he did not prove that he retained privacy interests by presenting "sufficient evidence that he maintained frequent contact with the property, retained the right to exclude others or engaged in other

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<sup>1</sup> The court also found that the officers possessed a reasonable and articulable suspicion sufficient under *Terry v. Ohio*, 392 U.S.1 (1968) to justify stopping the petitioner's van, and they had probable cause to arrest the petitioner. Both this Court and the Supreme Court upheld those findings on appeal and therefore, rejected the petitioner's claim that his statement should have been suppressed as "the unlawful fruit of the *Terry* stop and warrantless arrest." *Houghtaling*, 326 Conn. at 352-57 & n.16

significant contact with the property.” *Id.* at 348. Thus, he “established nothing but bare legal ownership.” *Id.* at 350.

The Supreme Court found the presence of an aeration system and mail addressed to the petitioner at the Canterbury address insufficient to establish his relationship to the searched property.<sup>2</sup> *Houghtaling*, 326 Conn. at 350. The Supreme Court also rejected the petitioner’s claim that he had a reasonable expectation of privacy in the property because he participated in the marijuana grow operation. *Houghtaling*, 326 Conn. at 351. It concluded that, “[e]ven if a defendant could establish a subjective expectation of privacy through his participation in a criminal conspiracy,” the petitioner did not present sufficient evidence to establish the nature of his involvement. *Id.* at 351-52. It also found that the petitioner’s “own statements to the police suggest that his presence at the property was more limited than he would now have us believe.” *Id.*

### **C. Habeas Petition And Hearings**

In his habeas petition, the petitioner alleged primarily that his trial counsel, Alan Sobol, performed deficiently in: (1) failing to adequately research, investigate, prepare, and present evidence demonstrating the petitioner’s reasonable expectation of privacy in the searched premises; (2) advising the petitioner not to testify at the suppression hearing; and (3) failing to call him and Phravixay to testify at that hearing.<sup>3</sup> P/A at A8-A9.

The evidence showed the following.

#### **1. Alan Sobol**

Attorney Sobol testified that he began representing the petitioner against multiple drug charges after Attorney Christian Sarantopoulos withdrew due to a conflict of interest. HT1 at

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<sup>2</sup> Regarding the mail, the Court pointed out, “The defendant did not submit the mail into evidence or even identify what type of mail it was.... Without knowing the nature or the volume of the correspondence, we cannot assume that it was significant or anything other than junk mail. Additionally, no evidence was offered about whether or how often the defendant went to the property to retrieve the mail.” *Houghtaling*, 326 Conn. at 350.

<sup>3</sup> The petitioner alleged several other claims of deficient performance that he did not pursue at the habeas hearing. HT 3 at 104-05.

13-15. At their first meeting on April 7, 2011, Sobol and the petitioner discussed the case for over two hours. P.Ex. 12; R.Ex. B.

Because the state had offered to settle the matter for a lower sentence if the petitioner pled guilty outright, without filing a motion to suppress, Sobol's firm first researched whether the petitioner had "a shot at prevailing" on such a motion. HT1 at 41; R.Ex. C. In May 2012, an associate drafted a memorandum analyzing the legality of the task force's search and whether the petitioner had standing to contest it.<sup>4</sup> HT1 at 41-42, 51-52; Sobol reviewed the memorandum, admitted as Exhibit 4, with the petitioner, who "signed off on it." *Id.*; R.Ex. C.

Sobol testified that the petitioner told him – as he had told police and Attorney Sarantopoulos – that he was not at the property often. HT1 at 52.

He didn't sleep there, didn't live there, was very busy with his business in the Danbury/New Milford area, so he was rarely there. He had rented the property ... to Phravixay. Phravixay had his wife stay with him from time to time, especially during the winter. His uncle came in the spring.... [The petitioner] had basically yielded dominion and control over the property to Phravixay. So on the standing issue, based on everything he told us, it was a significantly uphill fight.

*Id.*

Based on his research and what the petitioner told him, Sobol advised the petitioner that the chances of winning the "motion to suppress at the trial level would be slim," and that his "best shot would be on appeal." HT1 at 41-42. Sobol also advised the petitioner that some circumstances supported his standing argument: his ownership of the property, its secluded nature, the gate, the no trespassing sign, and the mail and aeration system addressed to the petitioner that police found at the Canterbury property. *Id.* Although the standing issue presented challenges, the petitioner wanted Sobol to file a motion to suppress. *Id.* at 54.

The petitioner repeatedly instructed Sobol not to do anything to bring Phravixay back

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<sup>4</sup> That memorandum discussed *State v. Charron*, 2002 WL 317269 (Conn. Super. 2002), which held that an absentee owner lacked standing to contest the search of his property and the seizure of marijuana plants there. T 2/26 at 53-54; P/A at A65-A67 (P.Ex. 4). Sobol gave the petitioner a copy of the case. T 2/26 at 66.

into the case or to expose the petitioner's brother-in-law, Eichen, whose case had been nolle, to any further prosecution. See, e.g., HT1 at 16-18, 27, 57, 111-15, 135, 140, 151-52. The petitioner told Sobol that his wife was terrified of Phravixay, who belonged to a Chinese gang, and that the petitioner feared retribution if Phravixay, who had pled guilty on October 25, 2011, was drawn into the case again. *Id.* at 16-18, 27, 57. The petitioner also told Sobol that the prosecutor had advised Sarantopoulos that pursuing a motion to suppress could result in "Eichen being brought back into the case." *Id.* at 16-18, 153. Although the state had nolle Eichen's case more than 13 months before the suppression hearing, Sobol believed that the statute of limitations had not yet run on all charges and that Eichen could still be prosecuted.<sup>5</sup> HT 4/27 at 6-7. Sobol also stated that he discussed with the petitioner whether he should testify at the suppression hearing, but the petitioner decided not to, and Sobol "didn't disagree" with that decision. HT1 at 156, 158-59.

Thus, Sobol developed a strategy that honored his client's wishes not to "draw Phravixay or Eichen into the case" or require the petitioner's testimony. HT1 at 18-19. He decided to challenge the search through cross-examination of arresting officers. *Id.* at 18, 65. He also believed that he might be able to suppress the petitioner's police statement and consent to search by attacking the *Terry* stop of the petitioner and his arrest. *Id.* at 54.

Sobol had in his file a "proffer," drafted by Phravixay's attorney, that conflicted with the petitioner's version of events and heavily implicated both the petitioner and Eichen in the illegal marijuana farm. P.Ex 13. Sobol believed that testimony from Phravixay, if consistent with the proffer, might have strengthened the petitioner's claim of standing, but not by very much. HT1 at 124, 135. Sobol noted that "Phravixay never said my client spent the night there," "did repairs there," "exercised exclusive control over the property," or other indicia of standing. *Id.* Thus, Sobol did not call Phravixay to testify at the suppression hearing because: (1) the petitioner instructed him not to do so; and (2) Sobol believed that Phravixay's

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<sup>5</sup> As the habeas court noted, Eichen and Phravixay also may have violated federal statutes and may have still been subject to federal prosecution in 2013. P/A at A33-A35, A39.

testimony would have been damaging to both the petitioner and Eichen and could derail the petitioner's prospects for an advantageous plea agreement, if the suppression motion failed. HT1 at 45-46, 58.

Sobol did not call the petitioner to testify either because: (1) "he didn't want to testify and that's his choice";<sup>6</sup> (2) if the state called Phravixay in response, that testimony risked further implicating the petitioner and Eichen; (3) Sobol believed, based on what the petitioner had divulged to him, that his testimony would be more harmful than helpful on the standing issue; and (4) testifying would expose the petitioner to cross-examination. *Id.* at 160. Although Sobol discussed with the petitioner his testifying at the suppression hearing, he did not explain that, if the petitioner testified at the suppression hearing, his testimony could not be used at trial because such a discussion would have been hypothetical in light of the petitioner's instructions not to call him as a witness.<sup>7</sup> HT2 at 4-5.

On July 2, 2012, Sobol filed a 43-page motion to suppress the seized evidence, statements by the petitioner and Phravixay, and "any other evidence obtained as a result of the invalid *Terry* stop and arrest of the petitioner." See P/A at A108-A150. That motion discussed the petitioner's standing to contest Phravixay's consent to search. HT1 at 75-76. In addition, the entire suppression hearing "dealt with standing," and Sobol argued that the petitioner had standing to contest the search *Id.* at 76-78, 93-110. Sobol decided for at least two strategic reasons not to address the landlord/tenant relationship. First, that issue "triggered Phravixay," which the petitioner instructed him to avoid. *Id.* at 111. Second, the evidence that the petitioner gave Sobol "was extremely weak on having any dominion and control over that property," and Sobol was limited by what his client told him. *Id.* Thus, Sobol "approached [the standing issue] the best way [he] could in terms of he's the owner; he's got mail in the mailbox; there's mail ... in the house." HT1 at 112.

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<sup>6</sup> Sobol testified that he had rarely seen a client and his wife "so worried about threats to their safety, threats to their family . . . with a guy like Phravixay." HT at 165.

<sup>7</sup> The habeas court's contrary finding; P/A at A31; is either a scrivnor's error or clearly erroneous.

## 2. William Paetzold

Attorney William Paetzold testified as an expert for the petitioner. HT2 at 111, 150. He opined that Sobol's performance fell below the standard expected of criminal defense lawyers in litigating the motion to suppress. HT2 at 112. According to Paetzold, Sobol could have made a proper record at the suppression hearing of the petitioner's standing by: (1) having Phravixay testify; (2) having the petitioner testify; and (3) seeking and introducing some of the mail that the petitioner received at the Canterbury property. *Id.* at 114, 122-26.

Paetzold minimized Sobol's concerns about having Phravixay testify, asserting that his testimony would have mirrored that of the petitioner.<sup>8</sup> HT2 at 144. Paetzold also criticized Sobol for honoring the petitioner's wishes. In Paetzold's view:

You can't let the client control you. If the client starts dictating, I'm going to say, if you want me to represent you, these are the points I want to make ... and if you don't want me to make those points, then find another lawyer.... I would have told [the petitioner], if you want me to represent you ... I'm putting you on the stand.

HT2 at 136-37; *see also id.* at 160-61 (effective lawyer would tell client to get another lawyer if client refused to testify and his testimony was essential).

Paetzold acknowledged that Sobol's file contained the petitioner's police statement and two letters to Sarantopoulos in which the petitioner minimized his connection with the property. HT2 at 150-52. In one letter to Sarantopoulos, the petitioner wrote that he "was not guilty of the charges," was renting the house to Phravixay, was going there on the day of the search to "try to get rent and some smoke from him," had "no knowledge of the extent of the growing that was taking place there" and no "involvement in it." *Id.* (quoting R.Ex.E).

Although Paetzold opined that a competent lawyer would have called Phravixay to testify, he conceded that Phravixay may not have been motivated to testify favorably for the

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<sup>8</sup> Paetzold assumed that the petitioner would contradict what he had told police and his attorneys and testify consistently with Phravixay's proffer. HT2 at 144-45, 157-58. By contrast, Sobol believed that the petitioner's testimony would be consistent what he had said to police and to both Sobol and Sarantopoulos. See HT1 at 24-25, 153-54, 162.

petitioner. *Id.* at 163-64. Paetzold also recognized that the standing issues presented in this case were novel and difficult. HT2 at 160-62.

### **3. The Petitioner**

The petitioner testified that he purchased the Canterbury property and some of its furnishings in June 2009. HT3 at 10-12; P.Ex. 5. Phravixay started living in the house about a month after the petitioner purchased it. HT3 at 12, 24. Phravixay was there four to five times a week, growing marijuana, and his uncle stayed at the property even more consistently. *Id.* at 22-24. The petitioner testified that he had keys to the Canterbury house and began sleeping there soon after he purchased it but usually stayed at his home in Danbury, with his family. *Id.* at 12-13. Shortly before his arrest, the petitioner was at the Canterbury property “a couple of times a week” to maintain and do repairs on it. *Id.* at 13-15.

The petitioner described the equipment he stored at the Canterbury property and his activities there, including growing marijuana. HT3 at 14-19, 25. He contended that he told Sobol he kept tools at the property. *Id.* at 59-60. He also confirmed that he paid the utilities for the house and claimed that he would have provided bills to Sobol if asked. *Id.* at 27. He claimed that, although Sobol said that the mail found on the premises was important, he never asked the petitioner to give him any of such mail. *Id.* at 44-45. The petitioner admitted to throwing most of the mail away after his arrest, but he testified that he had retained some of it, which he could have given to Sobol. *Id.* at 37-39, 48, 63; see, e.g., P.Ex. 7 for identification, 8, 28. The petitioner also admitted that Sobol explained the importance of proving that he had a reasonable expectation of privacy in the property and that “standing is our Achilles heel,” but Sobol thought he could work around it. *Id.* at 45.

Although the petitioner admitted that he had lied when he told Sobol that he thought Phravixay was connected and dealing drugs, and that he (the petitioner) was concerned about his and his family’s safety, he claimed that he never instructed Sobol not to have Phravixay testify. HT3 at 62. He also stated that he never told Sobol that he was concerned about implicating Eichen. *Id.* at 62-63.

The petitioner claimed that Sobol never talked to him about testifying except to say “I never put my clients up to testify.” HT3 at 60-61. He stated that Sobol never told him that if he testified, the state might call Phravixay. The petitioner maintained that, if he had known how important it was for him to testify, he would have done so and approved of Phravixay testifying because he “could have beaten the charges.” *Id.* at 74, 99.

The petitioner admitted that he repeatedly lied to task force officers, to Sarantopolous, and to Sobol. HT3 at 36, 53-54, 58, 62, 79-80, 83-87, 90, 91, 98-99. He stated that he lied to his attorneys to give them something they could argue. *Id.* at 90-91. He also admitted that he and Phravixay had previously discussed “how silly it was that two people would get arrested for the same crime, and then both ... would have to serve time,” and, after his arrest, he asked Phravixay if he would be willing to take the charges for him. *Id.* at 90, 98, 101.

#### **4. Other witnesses**

Attorney Brian Woolf testified that, in 2010-2011, he represented Phravixay on charges resulting from the task force’s search of the Canterbury property. HT2 at 57. As further discussed in Section II.A. of the argument, *infra*, Woolf drafted a proffer, for discussion purposes only, to inform former Assistant State’s Attorney (“ASA”) Matthew Crockett ASA Crockett of possible testimony that Phravixay might be able to give at a trial or hearing in connection with the petitioner’s case. *Id.* at 58; P.Ex.13. In the end, Phravixay pleaded guilty in October 2011 and never testified. *Id.* at 67.

Crockett testified that he handled the prosecutions of the petitioner, Phravixay, and Eichen in 2010-2011. HT2 at 75. He recalled receiving the proffer from Attorney Woolf before February 28, 2011, the date that he faxed it to Attorney Sarantopoulos. *Id.* at 76-77; P.Ex. 13. Crockett did not put “much stock” in the proffer because it was drafted by Woolf; it was not a first-hand account from Phravixay himself. *Id.* at 78. Crockett nolleed the case against Eichen on March 4, 2011, because he did not believe there was sufficient evidence to charge him. HT2 at 77-78. He later negotiated a plea deal with Phravixay. *Id.* at 79. Crockett believed that Phravixay and the petitioner were equally culpable, so he tried to make the deals

consistent between them. *Id.* at 79. Crockett never threatened to bring back charges against Eichen if the petitioner filed a motion to suppress. *Id.* at 80-81. Crockett testified that, if the petitioner had testified at the suppression hearing, he might have called witnesses to rebut the petitioner's testimony. *Id.* at 84-87, 94-95, 100. He doubted that he would have called Phravixay, however, because he and the petitioner were pointing fingers at each other.

Attorney Christian Sarantopoulos testified that he originally represented both the petitioner and Eichen after their arrests. HT2 at 103. About one year into the representation, he moved to withdraw from representing the petitioner. *Id.* at 104. He further testified that Attorney Crockett never threatened to take action against Eichen if the petitioner filed a motion to suppress and that Sobol never asked him about such a threat. *Id.*

Attorney Richard Emanuel testified that he represented the petitioner in his appeal in the Connecticut Supreme Court and talked with him several times about standing. HT2 at 172-73. When Emanuel explained that his testimony would have been crucial to establish standing, which was the critical issue in his appeal, the petitioner showed surprise, if not shock, that he could have testified at the suppression hearing. *Id.* at 175-78.

Holly Eichen, the petitioner's sister and William Eichen's wife, testified that Sobol told her that he never puts his clients on the stand. HT3 at 4-6.

#### **D. The Habeas Court's Decision**

On September 4, 2018, the habeas court issued a written memorandum of decision denying the petitioner's claim that Attorney Sobol rendered ineffective assistance of counsel. P/A at A18-A34. In assessing Sobol's performance under *Strickland v. Washington*, 466 U.S. 668 (1984), the habeas court credited Sobol's testimony. In particular, the habeas court found that the petitioner had told Sobol, *inter alia*, that: (1) "he was only occasionally at the marijuana farm"; (2) "he wanted nothing done [that] would 'trigger' his co-conspirator's involvement"; (3) "Phravixay was connected to a Chinese gang related to the mafia," and the petitioner "was afraid of retribution for himself and his family," and his "wife was terrified"; and (4) "the petitioner wanted no action taken [that] might implicate his brother-in-law, William

Eichen, who had been arrested with the petitioner just outside of the largest marijuana farm in the history of the State of Connecticut.” P/A at A28.

Conversely, the court found that the petitioner had “no credibility,” based in part on his admissions at the habeas trial that he had lied “to his attorneys at least nine times....” P/A at A32. The habeas court concluded that “[t]he petitioner told anyone he thought could help him anything that would motivate them,” citing the petitioner’s testimony that he had told Sarantopoulos he was not cultivating marijuana so that he would “‘argue a little bit more in court.’” P/A at A31 (*quoting* HT3 at 54). The habeas court appeared to credit the petitioner’s admissions that: (1) he asked Phravixay to take the blame for the charges; P/A at A28-29 (citing HT 5/8 at 29); and (2) Sobol told him that “standing was the Achilles heel in the case” and “that the petitioner ‘needed a reasonable expectation of privacy on the property in order to establish standing.’” P/A at A30-A31 (*quoting* HT3 at 45-46).

The habeas court rejected the petitioner’s claim that Sobol performed deficiently in failing to call Thomas Phravixay as a witness at the suppression hearing. P/A at 35. The court credited Sobol’s reasons for not calling Phravixay and found them reasonable. *Id.* Moreover, because the petitioner had not called Phravixay to testify at the habeas trial, the habeas court concluded that the petitioner had “failed completely to prove what he would have said at the motion to suppress.” P/A at A35-A36. The court ruled that Exhibit 13, the proffer drafted by Attorney Woolf, did not prove what Phravixay would have said at the suppression hearing because it “was unsigned and unsworn. It was not in Mr. Phravixay’s own words[,] and the contents were not verified by Woolf.”<sup>9</sup> P/A at A35. The court also concluded that the petitioner failed to show a reasonable probability that, if Phravixay had testified, the result of

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<sup>9</sup> The court commented that, “if anything, Petitioner’s Exhibit 13 may explain why the petitioner was so anxious to keep Mr. Phravixay off the stand ... since ... [it] describes an extensive marijuana cultivation business ongoing since 2003 involving the petitioner’s legitimate business location, his sister’s house, and even his mother’s property in New Milford. And one never knows what an incarcerated co-conspirator will choose to say about his free co-conspirator after that person had asked him to take ‘the weight.’” P/A at A35.

the suppression hearing would have been different. P/A at A36.

The habeas court likewise rejected the petitioner's claim that Sobol performed deficiently by not calling the petitioner to testify at the suppression hearing.<sup>10</sup> P/A at A40. The Court found that Sobol's strategy was "formed by the facts of the case and information given to him by his own client." *Id.* As for Attorney Paetzold's opinion that competent counsel would have called the petitioner, the court noted that Paetzold was unwilling to acknowledge

that when a client refuses to testify he may not be able to be persuaded otherwise. And when a client gives a story to both his first two attorneys it would be difficult to ethically present contradictory testimony to a judge. And when his confession is contrary to his new story, it would be foolish to presume that a judge would credit such a late conversion.

P/A at A40-A41.

The habeas court also determined that the petitioner had not proven that Sobol's advocacy for suppression fell below the standard of reasonable counsel, noting:

Sobol advocated for the petitioner ... [in] a contested hearing—this is not a situation where counsel was not performing as counsel. To the contrary: Sobol presented cogent legal arguments ... and effectively cross examined the witnesses at the hearing. Sobol strove to prevail on the standing issue in spite of the information he obtained from the petitioner that he rented the house to Phravixay. There was no persuasive evidence to show that the petitioner resided at ... [the] Canterbury [property]; instead, he resided elsewhere and was only visiting the property for reasons related to the marijuana growing operation. *Baker v. Carr* sufficiently supported Sobol's arguments and the petitioner has failed to show how reliance on *Katz v. U.S.* would have resulted in the trial court concluding he had standing.

P/A at A40-A41. With regard to prejudice, the habeas court concluded that the petitioner failed to show that, absent any deficient performance, the trial court would have granted the motion to suppress. P/A at A42. The habeas court granted certification to appeal. P/A at A47.

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<sup>10</sup> The court discredited both the petitioner's testimony and that of his sister that Sobol said that "he never puts clients on the stand." P/A at A33.

## ARGUMENT

### **I. THE HABEAS COURT PROPERLY REJECTED THE PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.**

The petitioner asserts that the habeas court erred in concluding that Attorney Sobol was not ineffective in litigating the motion to suppress.<sup>11</sup> In particular, the petitioner argues that Sobol rendered deficient performance in that he: (1) never discussed with the petitioner his right to testify; (2) limited "standing evidence on the theory that the judge might punish the petitioner for filing a motion to suppress"; (3) was swayed by baseless fears of antagonizing Phravixay or implicating Eichen; and (4) relied "on *Baker v. Carr* in lieu of *Katz v. United States*" in pursuing the motion to suppress. P.Br. at 27-33. These arguments are unsupported by the record and ignore the habeas court's credibility findings and the precepts of *Strickland v. Washington*, 466 U.S. 668 (1984). Moreover, the petitioner has failed to show prejudice.

#### **A. Standard Of Review And Principles Of Law**

"In a habeas appeal, this [C]ourt cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but [its] review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Michael D. v. Commissioner of Correction*, 195 Conn. App. 6, 10–11 (2019).

A criminal defendant is guaranteed the right to the effective assistance of counsel by the state and federal constitutions.<sup>12</sup> *Michael D.*, 195 Conn. App. at 11. To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must show first

that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires

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<sup>11</sup> Although this is the petitioner's final claim, the Commissioner responds to it first as ineffective assistance of counsel was the contested issue below.

<sup>12</sup> As the petitioner does not cite the state constitution in his brief he appears to rely exclusively on the federal constitution for his claims.

showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland*, 466 U.S. at 687. "A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong ...." (Internal quotation marks omitted.) *Brian S. v. Commissioner of Correction*, 172 Conn. App. 535, 539, *cert. denied*, 326 Conn. 904 (2017).

#### **B. The Petitioner Did Not Establish Deficient Performance**

As the habeas court properly found, the petitioner did not establish that Attorney Sobol performed deficiently. P/A at A42.

The principles applicable to proving deficient performance are well settled.

In analyzing the performance prong of *Strickland*, our focus is on "whether counsel's assistance was reasonable considering all the circumstances.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy....

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.... At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

(Internal quotation marks omitted.) *Cooke v. Commissioner of Correction*, 194 Conn. App. 807, 820-21 (2019).

##### **1. Sobol reasonably advised the petitioner about testifying.**

The petitioner first claims that Attorney Sobol was deficient because "he never discussed the petitioner's right to testify." P.Br. at 27. His analysis ignores facts in the record and fails to "reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." *Cooke*, 194 Conn. App. at 820. It is

premised on the mistaken assertion that “Sobol neither informed the defendant of his right to testify nor counseled him on it.” D.Br. at 27. To the contrary, Attorney Sobol discussed the issue of testifying with the petitioner and advised that, if he testified, the state might respond by calling Phravixay, a result that the petitioner emphatically wanted to avoid because he and his wife feared retribution. HT1 at 20, 136-37, 165.

Despite Paetzold’s opinion that competent counsel would have insisted that the petitioner testify at the suppression hearing, the habeas court properly concluded that Sobol had sound reasons for not doing so. First, the petitioner did not want to testify; *see, e.g.*, HT2 at 4; and the habeas court recognized that such a client “may not be able to be persuaded otherwise.” P/A at A41. *See, e.g., Page v. State*, 615 N.E.2d 894, 895 (Ind. 1993) (counsel does not have duty to force client from intransigent position). Second, based on what the petitioner told him, Sobol judged it risky to call him because: (1) if the state called Phravixay in rebuttal, he would likely implicate the petitioner and Eichen in the grown operation and could adversely affect plea offers if suppression were denied;<sup>13</sup> (2) his testimony would have been more harmful than helpful on the standing issue; and (3) he would be subject to cross-examination at the hearing. HT1 at 160.

The habeas court credited Sobol’s testimony and found that the petitioner had not overcome “the strong presumption” that Sobol’s strategy was reasonable, noting the multiple lies that the petitioner had told Sobol and the difficulty in “ethically present[ing] contradictory testimony to a judge.” P/A at A32, A34, A41. Thus, the petitioner failed to show that Sobol incompetently advised him about testifying. *See, e.g., Saez v. Commissioner of Correction*, 138 Conn. App. 241, 247-51 (counsel not ineffective in advising defendant not to testify in support of self-defense claim), *cert. denied*, 323 Conn. 933 (2016); *Ostolaza v. Warden*, 26 Conn. App. 758, 763-64 (1992) (counsel’s advice regarding pros and cons of decision to testify was sound where petitioner “never evinced any desire to testify at trial,” and where he “would have been subject to attack” on numerous bases).

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<sup>13</sup> Whether this judgment was reasonable is discussed in Section B.2., *infra*.

If the petitioner is claiming that Sobol was deficient in failing to discuss *Simmons v. United States*, 390 U.S. 377 (1968), with him, that claim also fails. Under *Simmons*, a defendant's testimony in support of a motion to suppress evidence under the fourth amendment "may not thereafter be admitted against him at trial on the issue of guilt"; *id.*; 390 U.S. at 394; but it may be used to impeach the defendant. *United States v. Jaswal*, 47 F.3d 539, 543 (2d Cir.1995); *see also United States v. Salvucci*, 448 U.S. 83, 93 & n. 8 (1980); *State v. Davis*, 283 Conn. 280, 322 (2007). In *Gardener v. United States*, 680 F.3d 1006, 1008-10 (7<sup>th</sup> Cir. 2012), the Seventh Circuit held that defense counsel was not ineffective in failing to advise his client about the *Simmons* rule where his client claimed that the police had planted a gun on him during a pat-down search. The court concluded that defense "counsel had no reason to delve into a series of 'what if's' based on hypothetical possession." *Id.* at 1010. Similarly here, Sobol was entitled to accept the petitioner's stated desire not to testify, his comments distancing himself from the property and the illegal activities occurring there, and his expressed fear of Phravixay. Thus, Sobol was not constitutionally required to engage in a hypothetical discussion of what would occur if the petitioner chose to testify at the suppression hearing and testified contrary to what he had told police and his two attorneys.

None of the cases cited by the defendant hold that defense counsel is constitutionally required to discuss *Simmons* with a defendant who is pursuing a motion to suppress. In *Helmedach v. Commissioner of Correction*, 329 Conn. 726, 740 (2018), our Supreme Court affirmed that counsel's duty to advise a client about whether to testify "includes the duty to keep the defendant informed of all developments in the case material to the defendant's decision...." *Id.* at 741. Thus, the Court held that counsel performed deficiently in choosing to shield the petitioner from knowledge of **the state's plea offer** before she took the stand because that delay "interfered with the petitioner's decision about whether to testify by preventing her from making an informed choice." *Id.* The holding of a United States Supreme Court case of only theoretical relevance is not a "development in the case" like a formal plea

offer. See *Helmedach*, 329 Conn. at 742-43. The petitioner here had decided not to testify because he was afraid of Phravixay's involvement, not because he was afraid that his testimony at the hearing could be used against him at trial. Moreover, he did not want a trial; HT1 at 44; so he was not concerned about whether his testimony could be used against him at trial. Thus, under the circumstances here, the holding in *Simmons* was not material to the petitioner's decision not to testify, and Sobol was not required to discuss it with him.

**2. Sobol reasonably decided not to call Phravixay as a witness.**

The petitioner claims that Attorney Sobol performed deficiently in failing to call Phravixay as a witness due to fears that his testimony "could have derailed any plea by [the petitioner] and resulted in the judge not accepting a provisional nolo contendere plea, and could have ... negatively impacted [the petitioner] at sentencing." P.Br. at 28 (quoting HT1 at 119). In the petitioner's view, Sobol's fears were unfounded for two reasons: (1) *State v. Revelo*, 256 Conn. 494 (2001), prohibits a trial court from punishing a defendant for exercising his right to file a motion to suppress; and (2) the prosecutor, Matthew Crockett, testified at the habeas hearing that the state believed that the petitioner and Phravixay were equally culpable. P.Br. at 28. The petitioner's analysis is flawed.

The petitioner ignores Sobol's testimony, which the habeas court credited, that the petitioner "was quite clear" that he did not want Phravixay to testify. See, e.g., HT1 at 135; P/A at A28-A32, A36. The petitioner also fails to address the significance of the habeas court's finding that, although Phravixay's testimony might have been helpful to the petitioner's claim of standing, it would have implicated the petitioner in "an extensive marijuana cultivation business ongoing since 2003 involving the petitioner's legitimate business location, his sister's house and ... his mother's property." P/A at A35.

Contrary to the petitioner's argument, nothing in *Revelo* would have allayed Sobol's reasonable concerns about the harm Phravixay's testimony could cause if the motion to suppress was denied. *Revelo* would not have precluded the state from reevaluating the petitioner's plea offer if evidence from the suppression hearing implicated the petitioner more

fully than the state had previously believed. Nor would *Revelo* have prohibited the trial court from considering such evidence in determining an appropriate sentence. *Revelo* holds only that a **trial court** may not dictate “the terms of a plea agreement that exacts a penalty on the defendant for asserting his right to challenge the constitutionality of the search....”<sup>14</sup> *Id.*, 256 Conn. at 515-16. A court is not, however, barred from imposing a longer sentence after a failed motion to suppress if it explains why that sentence is appropriate. *Id.* at 516; *see also Alabama v. Smith*, 490 U.S. 794, 798-99 (1989) (no presumption of judicial vindictiveness where trial court articulates “reasons sufficient to justify the greater sentence”).

Similarly, Crockett’s testimony at the habeas hearing – that the state believed that the petitioner and Phravixay were equally culpable – does not mean that Sobol was deficient in fearing that Phravixay’s testimony could hurt the petitioner. P.Br. at 29. Crockett explained that he “didn’t put too much stock” in the draft proffer because it was written by Attorney Woolf, and Phravixay had not told Crockett his story face to face. T2 at 78; P.Ex. 13. The document itself specified that it was for discussion purposes only. P.Ex. 3. If, however, Phravixay had actually testified under oath at the suppression hearing, Crockett could well have changed his opinion as to the culpability of the petitioner and changed the plea offer. Thus, as the habeas court properly concluded, “[t]he petitioner has not established that Sobol’s performance fell below an objective standard of reasonableness” in fearing that Phravixay’s testimony could damage the petitioner. P/A at A36.

**3. Sobol made reasonable strategic choices based on the facts and instructions given by the petitioner.**

The petitioner next claims that Sobol’s strategy of “minimizing the petitioner’s involvement in the ... [Canterbury] property,” and honoring his client’s wishes to avoid antagonizing Phravixay or implicating Eichen was incompetent. P.Br. at 29-31. The petitioner’s analysis misconstrues the testimony below.

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<sup>14</sup>The Court noted that a **prosecutor** would not be “barred from threatening to recommend a greater sentence ... [if] the defendant refused to plead guilty prior to obtaining a ruling on his motion to suppress.” (Emphasis omitted.) *Revelo*, 256 Conn. at 515 & n. 28.

Contrary to the petitioner's first argument, Sobol did not testify that it was part of his **strategy** to minimize the petitioner's involvement in the Canterbury property. P. Br. at 29; Rather, he testified that "we had to deal with" the facts that the petitioner divulged – that "his presence on the property was thin." HT1 at 16-17, 52-53. Knowing that establishing standing was an uphill battle; *id.* at 53; Sobol decided to pursue the motion to suppress "from a legal perspective by cross-examining or calling [on] direct the state's people...." *Id.* at 18. The habeas court correctly found that strategy to be reasonable. See P/A at A40-A42.

The petitioner next argues that Sobol did not make a "reasonable strategic decision" in presuming that "the state would simply offer Phravixay a sentence modification to walk in to court and recant" the allegations set forth in the draft proffer authored by Phravixay's attorney. P.Br. at 30. Again the petitioner has misinterpreted Sobol's testimony and the attorney's concerns. Sobol believed that the petitioner would testify consistently with what he had told the task force officers and his attorneys. HT1 at 24-25, 153-54, 162. Thus, Sobol's fear was that, if the petitioner minimized his own role in the marijuana production and pointed the finger at Phravixay, the state would call Phravixay in rebuttal, and he would testify in a manner *consistent* with the proffer, not contrary to it. HT2 at 9. As the habeas court found, that testimony would implicate both the petitioner and Eichen in an "extensive marijuana cultivation business ongoing since 2003...." P/A at A35.

Finally, the petitioner's conclusory assertion that any threat to Eichen of further prosecution was "not viable and Sobol should have known it" lacks merit. The habeas court found that Eichen faced possible, ongoing exposure under federal drug laws at the time of the hearing. See P/A at A38. Once again, the petitioner ignores Sobol's testimony that he was clearly instructed not to implicate the petitioner's brother-in-law. On appeal, the petitioner cites no authority suggesting that Sobol acted deficiently in honoring his client's wishes.

**4. Sobol did not rely exclusively on *Baker v. Carr* in arguing that the petitioner had standing to contest the search.**

Sobol relied on *Baker v. Carr*, 369 U.S. 186 (1962), in asserting that the petitioner's own fourth amendment rights were violated by the task force's search. As the petitioner

correctly points out, that case concerns standing to contest the constitutionality of a statute, whereas *Katz v. United States*, 389 U.S. at 361, addresses standing to contest a search. P.Br. at 31-32. The habeas court concluded that “reliance on *Baker v. Carr* instead of *Katz*” did not demonstrate deficient performance by Sobol, “whose strategy [was] formed by the facts of the case and the information given to him by his own client.... *Baker v. Carr* sufficiently supported Sobol’s arguments....” P/A at A40-A41.

Contrary to the petitioner’s argument; P.Br. at 31-33; Attorney Sobol did not exclusively rely on *Baker* to argue standing, nor did he ignore *Katz*. In fact, Sobol cited *Katz* in his motion to suppress, albeit for the proposition that warrantless searches are nearly always unreasonable. P/A at A120. Moreover, Sobol relied on the *Katz* principles, even if he did not cite the case itself. For example, in arguing that the greenhouse, where the officers encountered Phravixay and found marijuana plants, was curtilage, Sobol discussed in depth the factors of *United States v. Dunn*, 480 U.S. 294, 301 (1987), including the petitioner’s efforts to protect his secluded property from public view. See P/A at A120-A122. These same factors are relevant to the *Katz* inquiry of whether the petitioner had shown a reasonable expectation of privacy in the searched premises. See generally *Houghtaling*, 326 Conn. at 348 (courts should test “a defendant’s subjective expectations by looking for conduct demonstrating an intent to preserve [something] as private, and free from knowing exposure to the view of others” [Internal quotation marks omitted]).

In addition, Sobol cited both *United States v. Salvucci*, 448 U.S. at 91-92, and *State v. Mitchell*, 56 Conn. App. 561, 565, *cert. denied*, 253 Conn. 10 (2000), for the proposition that “a defendant must first establish a reasonable expectation of privacy in the premises before he may assert that his Fourth Amendment rights have been violated by improper intrusion into those premises.” (Internal quotation marks omitted.) P/A at A140. Sobol also argued that the petitioner had acquired standing by having a proprietary or possessory interest in the premises and a property interest in the items seized.” *Id.* (citing *Brown v. United States*, 411 U.S. 223 (1973) and *United States v. Jeffers*, 342 U.S. 48 (1951)). Sobol further

contended that the petitioner had standing under *Wong Sun v. United States*, 371 U.S. 471 (1963), to contest the illegal entry onto his premises and the fruits of that illegal entry, including Phravixay's consent to search, because the petitioner "owned and had a possessory interest in the property[,] which he did not relinquish, despite having Mr. Phravixay on the property as a tenant, and he had had an expectation of privacy with respect to the curtilage. P/A at A141-A143. In light of these arguments, which relied on *Katz* principles, the habeas court properly concluded that Sobol's failure to cite *Katz* did not constitute deficient performance. See *Strickland*, 466 U.S. at 689 (reviewing court must indulge strong presumption that counsel's conduct falls within wide range of reasonable professional assistance; "[t]here are countless ways to provide effective assistance in any given case"); cf. *Johnson v. Commissioner of Correction*, 154 Conn. App. 614, 619 ("counsel's performance was not rendered deficient merely because they did not cite section of Evidence Code as an additional ground for objection"), *cert. denied*, 315 Conn. 930 (2015).

**C. The Habeas Court Properly Concluded That The Petitioner Failed To Establish Prejudice.**

The habeas court concluded that, even if it presumed deficient performance, the petitioner had not proven that he was prejudiced, explaining: "The petitioner has failed to show by a preponderance of the credible evidence that the trial court would have concluded that he had standing, nor has the petitioner proven that he would [have] prevail[ed] on the motion to suppress itself." P/A at A42. The petitioner's arguments on appeal; P.Br. at 33-35; fall far short of undermining the habeas court's conclusions.

To show prejudice sufficient to prevail on an ineffective assistance of counsel claim, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be *substantial* not just conceivable." (Emphasis added.) *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

As to prejudice flowing from the petitioner's failure to testify, the habeas court found that the petitioner had refused to testify at the suppression hearing, that he had lied to his

attorneys, that his habeas testimony was not credible, and that, had he testified and contradicted his police statement, "it would be foolish to presume that a judge would credit such a late conversion." P/A at A32, A41. These unchallenged findings defeat any claim of prejudice. *Michael D.*, 195 Conn. App. at 10 (facts found by habeas court cannot be disturbed unless clearly erroneous); *Smith v. Commissioner of Correction*, 179 Conn. App. 160, 173 (2018) (appellate court defers to habeas court's credibility assessments). Because the habeas court did not credit his testimony, he failed to establish that he would have testified at the suppression hearing had Sobol properly advised him. P/A at A32. See *Damon v. Commissioner of Correction*, 47 Conn. App. 132, 133-34 (1997), *aff'd*, 214 Conn. 146, *cert. denied*, 498 U.S. 819 (1990) (petitioner failed to show prejudice where he declined to testify). He also failed to show a reasonable probability that the suppression court would have believed him and ruled in his favor. *Rodriguez v. Commissioner of Correction*, 35 Conn. App. 527, 538, (no prejudice from petitioner's failure to testify because "jury would have been unlikely to attach much credence to his testimony"), *cert. denied*, 231 Conn. 935 (1994).

As to Phravixay's failure to testify, the habeas court properly rejected the petitioner's prejudice claims because he failed to show what Phravixay would have said at the suppression hearing. P/A at A35-A36. On appeal, the petitioner appears to argue that the habeas court was required to accept Exhibit 13, the draft proffer, for its truth and find that Phravixay would have testified in conformity with it. P.Br. at 30, 35. As explained *infra*, the habeas court as factfinder was allowed to give that exhibit – which was unsigned and had not been reviewed by Phravixay or verified by his counsel – whatever weight it deemed appropriate. In the habeas court's view, it was not worth a "warm bucket of spit." HT1 at 129.

Next, although Paetzold testified that competent counsel would not have relied on *Baker v. Carr* in the petitioner's case; HT2 at 149; the petitioner failed to show that the result of the suppression hearing would have been different had Sobol relied more extensively on *Katz*. See P/A at A41; see also *Haywood v. Commissioner of Correction*, 194 Conn. App. 757, 766 (2019) (no showing of reasonable likelihood that state Supreme Court would have

granted petition for certification if appellate counsel had cited *State v. Sanseverino*, 287 Conn. 608 (2008), *reconsidered*, 291 Conn. 574 (2009)).

The petitioner argues that certain exhibits admitted at the habeas hearing established the petitioner's reasonable expectation of privacy in the Canterbury house and demonstrated that Sobol's performance harmed the petitioner. In particular, the petitioner points to Exhibit 5 (agreement to purchase furnishings), Exhibit 9 (summary electricity bills for Canterbury property), Exhibit 8 (envelope containing Exhibit 28) and Exhibit 28 (Bank of America notice).<sup>15</sup> The petitioner's truncated analysis of how these exhibits establish prejudice is without merit for at least four reasons.

First, to prevail on his claim of ineffective assistance of counsel, a petitioner must show "that **particular** errors of counsel were unreasonable," and "**they** actually had an adverse effect on the defense." (Emphasis added.) *Strickland*, 466 U.S. at 693. Thus, the petitioner here was required to demonstrate that the particular errors that he claims Sobol made resulted in prejudice. Although at trial, Attorney Paetzold opined that Sobol rendered deficient performance in failing to offer mail like Exhibits 5, 9, 8 and 28 at the suppression hearing; HT2 at 124-26; the petitioner has not briefed that claim on appeal. Thus, it is irrelevant whether those documents would likely have established the petitioner's reasonable expectation of privacy in the searched property.

Second, it is unclear whether Sobol had access to these exhibits before the suppression hearing. Sobol was never asked if he had Exhibit 5 in his file or if he considered introducing it at the suppression hearing. He did not recognize Exhibit 8, which had not been opened in three years and still contained Exhibit 28. HT2 at 10, 164. It appears that Exhibit 9 was not even prepared until 2017, and Sobol was not asked about it. HT3 at 29.

Third, the petitioner's bald assertion that "[t]hese exhibits, together and separately" were sufficient to establish the petitioner's standing is contrary to fact and law. Attorney

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<sup>15</sup> He also claims that Exhibit 7 for identification demonstrated his reasonable expectation of privacy in the Canterbury property. P.Br. at 35. As discussed in Section III, *infra*, the habeas court excluded that exhibit, and the petitioner never asked Sobol about it.

Paetzold, the petitioner's expert did not think Exhibit 8 "by itself ... necessarily is going to show standing...." HT2 at 164. The habeas court also discounted the importance of that letter from Bank of America remarking, facetiously, "Exhibit 28 was so important that it was still sealed [within Exhibit 8] at the habeas trial." P/A at A38. Sobol testified that he did not think that bills showing that the petitioner paid the electricity for the Canterbury house would have been helpful for standing purposes because landlords often pay utilities for leased property and "it was not in dispute that [the petitioner] was the landlord." HT 11-12. Most importantly, these documents do not establish the facts that our Supreme Court considered important on direct appeal: "the frequency and nature of his visits to the property, or whether he retained a right to exclude others from any or all of the property." *Houghtaling*, 326 Conn. at 349-50.

Fourth, even if the admission of those documents at the suppression hearing had established the petitioner's standing, the petitioner has not shown that the trial court would have suppressed the seized evidence, given that both the petitioner and Phravixay consented to the search. For these reasons, the petitioner has failed to establish a reasonable probability that, absent any errors by Sobol, the outcome of the motion to suppress would have been different.

## **II. THE HABEAS COURT DID NOT ERR WHEN IT FAILED TO CONSIDER EXHIBIT 13 FOR ITS TRUTH.**

The petitioner claims that the habeas court deprived him of due process or committed plain error when it stated in its decision that Exhibit 13, the proffer drafted by Phravixay's attorney, "was only allowed to remain in this trial ... to show its effect upon Sobol, not for the truth of its contents." P.Br. at 12 (*quoting* P/A at A35). In the petitioner's view, the habeas court erroneously altered the status of Exhibit 13 without notice. The petitioner is wrong. The habeas court gave the parties ample notice and an opportunity to be heard on the effect of Exhibit 13. Moreover, as the finder of fact, the habeas court was entitled to give Exhibit 13 whatever weight it deemed appropriate. Thus, the habeas court committed no error at all, constitutional, plain, or otherwise.

## **A. Facts Related To This Claim**

Near the beginning of evidence, Exhibit 13 was marked as a full exhibit, without objection. HT1 at 22. As to that exhibit, Sobol testified that: (1) it was Phravixay's "draft proffer" that had been in Attorney Sarantopoulos's file when Sobol received it; (2) it appeared to be a fax from ASA Crockett to Sarantopolous; (3) it was unsigned, and Sobol did not know whether Phravixay had sworn to its contents; and (4) it contained statements contrary to what the petitioner had told Sobol. *Id.* at 23-24, 33, 38-40.

Later that day, the habeas court asked about Exhibit 13 and learned that no one knew whether Phravixay had ever signed the statement. HT1 at 122. The court expressed surprise that the state had disposed of Phravixay's case before settling the petitioner's case, "because that's not the way the system works. You get a deal; ... they hold onto you until you cooperate or fail." *Id.* The following discussion ensued:

THE COURT: This exhibit, Exhibit 13, where did that come from?

[HABEAS COUNSEL]: ... [T]his is the second draft of the proffer from Phravixay.

THE COURT: I don't know first, second. It doesn't seem to be signed. It's not stamped. It's not sworn to. What is it --

[HABEAS COUNSEL]: It was in Attorney Sobol's case file that he received from Attorney --

THE COURT: Yeah, but did Mr. Phravixay sign it?

[HABEAS COUNSEL]: ... I haven't seen a signed copy.

THE COURT: Well, then, what's it worth?

[HABEAS COUNSEL]: Evidence of what Phravixay would say.

THE COURT: How?

[HABEAS COUNSEL]: It was something in his file and in the file of Sarantopoulos. It was provided to him by the prosecutor in discovery, so it is a statement of the co-defendant provided by --

THE COURT: Not a statement until it's signed.

[HABEAS COUNSEL]: I disagree, Your Honor.

THE COURT: And as I'm telling you, they don't give the deal to the co-defendant until they're done with the one the deal is aimed at.

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THE COURT: So Phravixay was sentenced before even this was heard?

[HABEAS COUNSEL]: I have no personal knowledge of it, but from the Judicial Branch website, yes.

THE COURT: That's not right. We're going to have to get him in here and find out if he signed this thing.

HT1 at 125-27.

In response to further questions from the habeas court, Sobol testified that his copy of Exhibit 13 was not signed, sworn, or stamped. HT1 at 128. The court then commented, "So that may be a full exhibit, but it's the emptiest full exhibit I think I've ever seen." *Id.* When habeas counsel continued to question Sobol about Exhibit 13, the court interjected: "Have I made myself unclear? To paraphrase the late John Nance Garner, it's not worth a warm bucket of spit. It has no provenance." *Id.* at 129.

The following day, Phravixay's attorney, Brian Woolf, testified that he had prepared Exhibit 13 to "provide information to [ASA] Matt Crockett," in the hope that "Phravixay would possibly testify at a trial in connection with [the petitioner]...." HT 2 at 60. Woolf confirmed that the proffer was for discussion purposes only, was never signed by Phravixay, was not in Phravixay's words, and that his ultimate plea deal with the state did not require Phravixay to testify. HT2 at 59-67. Habeas counsel asked Woolf if Exhibit 13 "was a rendition of what his client had told him," but Woolf refused to answer, asserting the attorney-client privilege. *Id.* at 60. The respondent objected to the question on hearsay grounds, explaining that habeas counsel appeared to be "attempting through this witness to have Mr. Phravixay adopt this proffer as his own .... [W]hatever Attorney Woolf would have to say is hearsay." *Id.* at 61. Habeas counsel asked the court to order Woolf to answer his question, asserting that the attorney-client privilege was waived. *Id.* at 62-63. Woolf disputed that assertion because "it was disclosed for discussion purposes only to Attorney Crockett." After the court ascertained that that the document was in Sobol's file, the following discussion ensued:

THE COURT:... So what would be the purpose of the Court ordering Mr. Woolf to violate what he thinks is his ethical responsibility, since the only issue is was this in Mr. Sobol's file? Unless you have another issue.

[HABEAS COUNSEL]: ... [W]e'd like the statements [contained] in there to come in to show not only the effect ... that they had on Attorney Sobol, but also ...[for] the truth of the matter that Thomas Phravixay made these statements and ... to show what he would have--

THE COURT: Well, it's not a signed document, and according to Attorney Woolf, it never was signed.

[HABEAS COUNSEL]: Correct, Your Honor, but ... we're asking ... what did Thomas Phravixay say ... that could have been put into evidence ... [at] the motion to suppress to establish standing, and there are statements in there --

THE COURT: You're lucky you got this in as a full exhibit. Objection sustained. Move on.

HT2 at 63-64.

Woolf testified that he did not independently verify any of the facts set forth in the draft proffer. HT2 at 70. He explained that his general practice in drafting proffers is to accept what his clients tell him up until "the client is going to submit something like this under oath." *Id.* at 70-71. Exhibit 13 was never submitted under oath; "[i]t was never signed, period." Woolf elaborated that when he is getting ready to have his client sign such a proffer, he goes "over it very carefully with them," questions the client carefully about the statement's veracity, does an independent investigation, and makes every "good faith effort to verify the truth of the matters" in the statement. *Id.* at 72-73.

In its decision, the habeas court noted that Exhibit 13 was "unsigned and unsworn," "was not in Phravixay's own words," and was "not verified by Woolf. P/A at A35. This proffer, pre-marked by both parties, was only allowed to remain in this trial and an exhibit to show its effect upon Sobol, not for the truth of its contents." *Id.* The habeas court then discussed the effect of Exhibit 13 on the petitioner's and Sobol's concerns about testimony from Phravixay. See footnote 9, *supra*.

## **B. Principles of Law And Standard Of Review**

The following principles guide this Court's review of this claim.

[T]he trier [of fact] is bound to consider all the evidence which has been admitted, as far as admissible, for all the purposes for which it was offered and claimed.... [This Court] cannot assume that the [habeas] court's conclusions were reached without due weight having been given to the evidence presented and the facts found.... Unless the contrary appears, this [C]ourt will assume that the court acted properly....

(citations and internal quotation marks omitted.) *Moye v. Commissioner of Correction*, 168 Conn. App. 207, 229–30 (2016) (assuming court acted properly and considered all relevant

evidence even though court did not read entire criminal trial transcript), *cert. denied*, 324 Conn. 905 (2017).

Although the petitioner casts this claim as a constitutional one subject to plenary review, the proper standard of review is abuse of discretion.

In a trial to the court, the trial judge performs a dual function; he is the authority who must adopt the correct principles of law to apply to the facts which he finds in leading to the judgment rendered.... [T]he conduct of the trial must necessarily be left largely to the discretion of the presiding judge, a discretion which in its very nature cannot be made the subject of review by this court, except in a clear case of the abuse of that discretion....

*Evans v. Warden*, 29 Conn. App. 274, 277 (1992). In a court trial, it is the function of the court as the trier of fact “to consider, sift[,] and weigh all the evidence” and this Court gives “broad discretion” to the fact finder. *State v. Campbell*, 169 Conn. App. 156, 165, *cert. denied*, 324 Conn. 902 (2016).

**C. The Habeas Court Properly Exercised Its Discretion In The Way It Considered Exhibit 13.**

This Court should reject the petitioner’s claim that the habeas court’s treatment of Exhibit 13 violated his due process rights because it did not give the parties adequate notice of how it would consider Exhibit 13. See P. Br. at 17-18. To the contrary, as the transcript shows, the trial court informed the parties in no uncertain terms that, because Exhibit 13 was unsigned, unsworn, authored by Attorney Woolf, and not adopted by Phravixay, it was “an empty exhibit,” and that it was relevant only because it was in Sobol’s file. HT1 at 125-29; HT2 at 63-64. That habeas counsel had notice of the court’s views is demonstrated by his dogged attempt to force Attorney Woolf to testify that the statements in Exhibit 13 were “a rendition of what his client had told him,” so that the exhibit could be considered for its truth in addition to its effect on Sobol. *Id.* Moreover, the habeas court repeatedly told counsel that Exhibit 13 had little if any value and that Phravixay should be called as a witness. See, e.g., HT1 at 125-27. Thus, habeas counsel knew that the court would not consider Exhibit 13 as proof of how Phravixay would have testified at the suppression hearing.

The petitioner’s claim that the habeas court committed either constitutional or plain

error fails for two additional reasons. First, the habeas court, as fact finder, had broad discretion in weighing evidence and determining credibility when deciding this matter.<sup>16</sup> *Campbell*, 169 Conn. App. at 165. The admission of Exhibit 13, even as a full exhibit, did not compel the court to give it much weight; see *State v. Plaskonka*, 22 Conn. App. 207, 213 (although trial court gave exhibit only minimal weight, “such was not a violation of a constitutional right of the defendant”), *cert. denied*, 216 Conn. 812 (1990); or to find that the hearsay statements within it were true. Whether or not Exhibit 13 was *admissible* for its truth, it was for the habeas court as “fact finder to determine whether the hearsay statement [was] credible upon consideration of all the relevant circumstances.” *State v. Sotomayor*, 61 Conn. App. 364, 375 (2001), *appeal dismissed*, 260 Conn. 179, *cert. denied*, 537 U.S. 922 (2002).

Second, the petitioner has not shown that the habeas court’s treatment of Exhibit 13 prejudiced him, as is required to establish a due process violation; see *State v. Brawley*, 321 Conn. 583, 590 (2016); or constituted an error “so obvious that it affects the fairness and integrity of ... the judicial proceedings,” as required to prove plain error. *State v. George A.*, 308 Conn. 274, 289 (2013). The petitioner claims that Exhibit 13, standing alone, was sufficient to prove standing and corroborated the rest of the petitioner’s case. The issue, however, is whether Attorney Sobol, after reviewing Exhibit 13, was ineffective in failing to call Phravixay as a witness at the suppression hearing to establish the petitioner’s standing. The habeas court duly considered Exhibit 13 for that purpose and credited Sobol’s testimony that he did not call Phravixay for many reasons, including the content of the proffer.

### **III. THE HABEAS COURT PROPERLY EXCLUDED A LETTER FROM THE IRS; ALTERNATIVELY, ANY ERROR WAS HARMLESS.**

The petitioner claims that the habeas court abused its discretion in excluding from evidence Exhibit 7 for identification, which purported to be a letter from the IRS, that was addressed to the petitioner at the Canterbury property and concerned taxes he apparently

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<sup>16</sup> This is not a case where the habeas court ignored the exhibit. *Cf. Evans*, 29 Conn. App. at 278. As its decision makes clear, the habeas court read Exhibit 13 and determined that Sobol made certain strategic judgments based upon it. P/A at A35.

owed on the property. See P/A at A76-A80. The petitioner fails to show that the habeas court abused its discretion in excluding this letter from evidence and that any error was harmful.

**A. Facts Related To This Claim**

Attorney Paetzold testified that Exhibit 7 for identification was the type of document that competent counsel would have presented at the motion to suppress to support the petitioner's claim that he had a reasonable expectation of privacy in the Canterbury premises. HT2 at 124-26. Attorney Emmanuel testified that, when he represented the petitioner in 2015, he asked for any information relating to standing, and the petitioner brought him Exhibit 7 for identification. *Id.* at 178-79. The Commissioner claimed that Emmanuel's testimony about the exhibit was irrelevant because the letter did not come to light until 2015, well after Sobol litigated the motion to suppress. *Id.* at 179, 184-85. The habeas court sustained the relevance objection and noted that Exhibit 7 had not been shown to be a business record. *Id.* at 186.

The petitioner testified that Exhibit 7 for identification was an IRS letter addressed to him at the Canterbury property and pertained to taxes that he owed. HT3 at 39. His counsel offered the exhibit "simply to show the type of mail that [the petitioner] was receiving at the Canterbury property, not for the truth of the matter of the writing inside it." *Id.* The Commissioner objected on hearsay grounds, remarking that "if it's not being offered for the truth of the matter asserted, I don't know what it's being offered for." *Id.* at 40. Habeas counsel responded that the "letter was being offered to show that [it] ... was received by the petitioner at the Canterbury property," and that it was relevant because the Connecticut Supreme Court "said in its opinion," that "it was very important to know ... precisely [what mail] ... the petitioner [was] receiving." *Id.* The Commissioner responded that the petitioner was offering the letter at least for the truth of the address. *Id.*

The habeas court ascertained that the letter was dated more than two months before the task force searched the property, that the task force did not seize the letter, and that the petitioner did not give the letter to Sobol. HT3 at 41-43. 45. The petitioner then testified that he would have given Sobol Exhibit 7 for identification had Sobol explained that such mail

would establish his reasonable expectation of privacy in the Canterbury property. *Id.* at 44-46. When counsel offered Exhibit 7 again, the Commissioner again objected on both hearsay and authentication grounds. *Id.* at 46-47. The habeas court sustained the objection, explaining:

The state's objecting that its hearsay, an out-of-court document to prove the truth of some of the matter contained therein or thereon. And secondarily, it does not fall under the business records exception based on the evidence that has been offered so far.

*Id.* at 47. The petitioner later testified that Exhibit 7 for identification was available to Attorney Sobol had he asked for it. *Id.* at 63.

#### **B. Pertinent Legal Principles And Standard Of Review**

The standard of review applicable to this claim is well settled. A habeas court has broad discretion in ruling on the admissibility ... of evidence" and its ruling "will be overturned only upon a showing of a clear abuse of the court's discretion...." (Internal quotation marks omitted.) *Saez*, 138 Conn. App. at 253. Nevertheless,

To the extent [that] a trial court's admission of evidence is based on an interpretation of [the] [law of evidence], [the] standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review....

*Bennett v. Commissioner of Correction*, 182 Conn. App. 541, 548–49, *cert. denied*, 330 Conn. 910 (2018).

"An out-of-court statement is hearsay when it is offered to establish the truth of the matters contained therein.... As a general rule, hearsay evidence is not admissible unless it falls under one of several well established exceptions...." *State v. Bennett*, 324 Conn. 744 (2017). Under section 8-4 of the Connecticut Evidence Code,

Any writing or record ... made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.

**C. The Habeas Court Properly Excluded Exhibit 7; It Was Hearsay And Irrelevant.**

The habeas court did not err in determining that Exhibit 7 for identification should be excluded as inadmissible hearsay. Although at trial, the petitioner claimed that he was not offering Exhibit 7 for its truth, its significance lay in the truth of its contents. P. Br. at 23. On appeal, the petitioner claims that the letter “demonstrated standing” because it concerned “a somewhat taboo and ignominious topic – his inability to pay taxes and potential insolvency,” P.Br. at 25-26. Thus, Exhibit 7 was an out-of-court statement offered for the truth of its subject matter, and, therefore, it constituted hearsay. *State v. Connelly*, 46 Conn. App. 486, 502 (1997), *cert. denied*, 244 Conn. 907-08, *cert. denied*, 525 U.S. 907 (1998); *see also State v. John G.*, 80 Conn. App. 714, 730 (2004).

*State v. Caulderon*, 82 Conn. App. 325, 323-24, *cert. denied*, 270 Conn. 905, *cert. denied*, 543 U.S. 982 (2004), does not bolster the petitioner’s claim that Exhibit 7 was not hearsay. In *Caulderon*, the trial court admitted an envelope and a letter that the defendant sent to her daughter in violation of a “no contact” order. *Id.* at 323. This Court held that the exhibit was not offered for its truth, but “rather to prove that that the defendant had violated the ... order.” *Id.* In that case, “mailing the envelope was sufficient”; its contents were irrelevant. *Id.* at 324. Here, by contrast, the petitioner’s offered a letter, purportedly from the IRS, to show that he was receiving mail containing sensitive financial information at the property. Thus, the petitioner was relying on the contents of the letter, and the habeas court properly excluded the letter as hearsay.

The defendant does not (and cannot) argue that he met the requirements for admitting Exhibit 7 under the business records exception. No one was called to testify that the letter met the requirements set forth in Conn. Code Evid. § 8-4. The petitioner appears to argue for the first time on appeal that Exhibit 7 was admissible under the residual hearsay exception because it contained “all the indicia of authenticity and reliability necessary for its admission as a full exhibit,” and IRS are employees not subject to subpoena. P.Br. at 24 & n. 10; Conn. Code Evid. § 8-9. This Court should decline to review this claim because it was not preserved

below. *Bennett*, 182 Conn. App. at 554.

In any event, the letter was irrelevant to the issues of Sobol's ineffectiveness. The habeas court sustained the Commissioner's relevancy objections to questions asked of Attorney Emanuel about the exhibit because the exhibit did not come to light until well after Sobol's representation of the petitioner. HT2 at 179-80. Moreover, Exhibit 7 was never given to Sobol, and he was asked no questions about it at the habeas trial. Paetzold's opinion that Sobol deficiently failed to offer the letter at the 2013 suppression hearing because, in 2017, our Supreme Court suggested that mail of that type might establish standing is precisely the type of hindsight forbidden by *Strickland*, 466 U.S. at 689. Thus, Exhibit 7 was not relevant to prove deficient performance, and it was properly excluded.

**D. Alternatively, The Petitioner Has Not Shown Harm.**

Any error in excluding Exhibit 7 was harmless. "A nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the [judgment]" (Internal quotation marks omitted.) *State v. Eleck*, 314 Conn. 123, 129 (2014). The petitioner failed to carry his burden of showing that the habeas court's judgment was substantially swayed by its exclusion of Exhibit 7. See *Corbett v. Commissioner of Correction*, 133 Conn. App. 310, 318 (2012).

The petitioner was not harmed by the habeas court's exclusion of Exhibit 7 for three reasons. P.Br. at 25. First, Exhibit 7 was cumulative of both the petitioner's testimony as to the volume and type of mail he received; see, e.g., HT3 at 38-40; and of other exhibits admitted at the habeas hearing. See P.Ex. 8, 9, 28. Second, the petitioner was permitted to testify that Exhibit 7 was a letter he received at the Canterbury premises from the IRS concerning back taxes and that he would have given it to Attorney Sobol had Sobol asked him to produce mail of that sort. HT3 at 39, 44-46, 63. Third, it is unlikely that, if admitted, Exhibit 7 would have convinced the habeas court to that Sobol was ineffective in litigating the motion to suppress. Accordingly, any error in excluding the exhibit was harmless.

**CONCLUSION**

For all of the foregoing reasons, the Commissioner respectfully requests that this Court affirm the habeas court's denial of the petition.

Respectfully submitted,

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### CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate procedure § 67-2 that

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with all provisions of this rule.

  
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